Supreme Court, U.S.
FILED
DEC 6 1999
CLERK

(3)

No. 99-456

In the Supreme Court

OF THE

United States

OCTOBER TERM 1999

H. KEITH HENSON,
Petitioner,
VS.
RELIGIOUS TECHNOLOGY CENTER,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

CHARLES B. ROSENBERG
Counsel of Record
ANN I. PARK
ROBERT J. STOCK
HELLER EHRMAN WHITE & MCAULIFFE
601 South Figueroa Street
Los Angeles, California 90017
(213) 689-0200
Attorneys for Petitioner

December 6, 1999

Bowne of Los Angeles, Inc., Law Printers (213) 627-2200

37pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. HENSON'S COPYING TWO PAGES OF NOTS 34 TO EXPOSE CRIMINAL ACTIVITY WAS FAIR USE, AND HIS FIRST AMENDMENT RIGHTS WERE VIOLATED WHEN THE COURTS BELOW PUNISHED HIM FOR DOING IT 1

II. INTEMPERATE SPEECH AND INTEMPERATE SPEAKERS ARE PROTECTED BY THE FIRST AMENDMENT 5

III. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH RELEVANT OPINIONS OF THIS COURT — OPINIONS WHOSE EFFECT IS TO PREVENT THE COPYRIGHT ACT FROM BEING USED TO SUPPRESS NONCOMMERCIAL POLITICAL SPEECH 6

IV. HENSON RAISED THE FIRST AMENDMENT AND FAIR USE ISSUES BELOW BUT RTC *OPPOSED* HENSON'S MOTION TO HAVE PRO BONO COUNSEL FULLY BRIEF THOSE ISSUES 9

TABLE OF AUTHORITIES

Page(s)

Cases

American Geophysical Union v. Texaco, Inc.,
60 F.3d 913 (2d Cir. 1994) 2

Baumgartner v. United States,
322 U.S. 665 (1944) 6

Beauharnais v. Illinois,
343 U.S. 250 (1952) 5

Belmore v. City Pages, Inc.,
880 F. Supp. 673 (D. Minn. 1995) 3, 4

Campbell v. Acuff-Rose Music, Inc.,
510 U.S. 569 (1984) 6, 8

Carlson v. Green,
446 U.S. 14, 17 n.2 (1980) 10

Consumers Union of U.S., Inc. v. General Signal Corp.,
724 F.2d 1044 (2d Cir. 1983), *cert. denied*, 469 U.S. 823
(1984) 5

CSM Investors, Inc. v. Everest Dev., Ltd.,
840 F. Supp. 1304 (D. Minn. 1994) 8

Fisher v. Dees,
794 F.2d 432 (9th Cir. 1986) 8

Haberman v. Hustler Magazine, Inc.,
626 F. Supp. 201 (D. Mass. 1986) 3

Harper & Row, Publishers, Inc. v. Nation Enters.,
471 U.S. 539 (1984) 4, 6, 7, 8

*National Rifle Ass'n of America v. Handgun Control
Federation of Ohio*,
15 F.3d 559 (6th Cir. 1994) 7

New Era Publications ApS v. Henry Holt & Co.,
873 F.2d 576 (2d Cir. 1989) 8

New Era Publications Int'l, ApS v. Carol Publishing Group,
904 F.2d 152 (2d Cir.), *cert. denied*, 498 U.S. 921 (1990) 8

Norse v. Henry Holt & Co.,
847 F. Supp. 142 (N.D. Cal. 1994) 9

R.A.V. v. City of St. Paul,
505 U.S. 377 (1992) 8

Roy Export Co. v. Columbia Broadcasting Sys., Inc.,
503 F. Supp. 1137 (S.D. N.Y. 1980), *aff'd* 672 F.2d 1095
(2d Cir.), *cert. denied*, 459 U.S. 826 (1982) 6

Rubin v. Brooks/Cole Publishing Co.,
836 F. Supp. 909 (D. Mass. 1993) 4

Salinger v. Random House, Inc.,
811 F.2d 90 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987) 8

Sinkler v. Goldsmith,
623 F. Supp. 727 (D. Ariz. 1985) 8

Sony Corp. of America v. Universal City Studios, Inc.,
464 U.S. 417 (1984) 6, 7

State of Florida v. Church of Scientology Flag Org., Inc.,
Cr. C-98-20377 (Fla. Cir. Ct.) 3

Sundeman v. Seajay Society, Inc.,
142 F.3d 194 (4th Cir. 1998) 7, 9

United States v. Article or Device "Hubbard Electrometer,"
333 F. Supp 357 (D.D.C. 1971) 2

Williams & Wilkins Co. v. United States,
487 F.2d 1345 (Ct. Cl. 1973), *aff'd by equally divided*
Court, 420 U.S. 376 (1975) 2

Wright v. Warner Books, Inc.,
953 F.2d 731 (2d Cir. 1991) 9

Regulations

37 C.F.R. § 202.3(b)(3)(i)(B) 2

Treatises

M. Nimmer & D. Nimmer, 4 *Nimmer on Copyright* § 13.05[D][1] (1999) 2

Other Authorities

Matthew W. Wallace, *Analyzing Fair Use Claims: A Quantitative And Paradigmatic Approach*, 9 U. Miami Ent. & Sports L. Rev. 121, 137 (1992) 2

INTRODUCTION

The federal question raised by this Petition is substantial indeed: whether the First Amendment permits a copyright owner to use the power of the courts to suppress political speech when that speech interferes not a whit with the goals of the Copyright Act — protection of the copyright owner's commercial interests.

In this case, Respondent persuaded a United States District Court not only to enjoin Petitioner from posting the two-page NOTs 34 on the Internet, but to permit a jury to fine him $75,000 for having done so in the first place. It is hard to imagine a result more chilling, not only to Petitioner's First Amendment rights, but to those of anyone who wishes to criticize powerful organizations like Respondent with written evidence to back up the criticism.

Respondent contends that Petitioner need not have posted the full two pages of NOTs 34 in order to make his commentary understandable. Yet Respondent does not suggest what portion of the document Petitioner should have quoted to make his point persuasively. Indeed, the Opposition quotes not a single word from the document itself.

Petitioner has, accordingly, today filed a copy of NOTs 34, under seal, with the Court. [App. R-1 (filed under seal), also at ER 511-15.] Petitioner believes that examining the document itself is the only way to understand why a full publication of the document was necessary to support Petitioner's claim that it constituted a criminal act and endangered public safety.

In addition to the important constitutional and copyright issues raised, this Petition should be granted because the Ninth Circuit's decision conflicts with and misapprehends this Court's relevant precedents. Sup. Ct. Rule 10(c).

I. HENSON'S COPYING TWO PAGES OF NOTs 34 TO EXPOSE CRIMINAL ACTIVITY WAS FAIR USE, AND HIS FIRST AMENDMENT RIGHTS WERE VIOLATED WHEN THE COURTS BELOW PUNISHED HIM FOR DOING IT

RTC's opposition waxes indignant at Henson's temerity in copying two pages of text. Using phrases like "decisively

militates" and "under virtually any circumstance," RTC stops just short of asserting that a reproduction of an entire work[1] *automatically* precludes a finding of fair use. Opp. at 24-25.[2]

This is an exaggerated legal claim, but particularly so in the context of political speech. "[C]opying . . . the entire work *for a different functional purpose* may be regarded as fair use." M. Nimmer & D. Nimmer, 4 *Nimmer on Copyright* § 13.05[D][1] (1999) (emphasis added). This is precisely what happened here.[3] The purpose of NOTs 34 was to instruct so-called auditors on how to treat medical conditions with a galvanometer and two tin cans.[4]

---

[1] Henson does not concede that he copied the "entire work." For purposes of fair use, the 700-page Advanced Technology materials should be "the work" against which the copied two pages are measured. Contrary to RTC's assertion, the district court did not make an "explicit factual finding[]" that Henson copied the work in its entirety. Opp. at 25 n.21. The court made a *legal* finding, which is, of course, subject to appellate review. [App. B at A18.]

Whether an element in a collection of previously unpublished material is "self-contained" has received scant judicial scrutiny. *See* 37 C.F.R. § 202.3(b)(3)(i)(B). In particular, no court has analyzed whether a collection of unpublished material *by the same author* or only a single element of that collection should be considered "the work" for fair use purposes. Even *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913 (2d Cir. 1994), relied heavily on the separate authorship and independent copyright of the journal articles. *Id.* at 926. According to *Texaco*, the only other appellate court to consider this question "recognized that each article constituted an entire work in the fair use analysis." *Id.* (citing *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1353 (Ct. Cl. 1973), *aff'd by equally divided Court*, 420 U.S. 376 (1975)). But *Williams*, which, like *Texaco*, involved journal articles by different authors, *never analyzed the issue.* Instead, *Williams* simply assumed that each article was the standard for measuring fair use. In fact, the word "collective" does not even figure in the decision.

[2] According to a study, courts have found fair use 16.3% (or about 1/6) of the time when "substantial copying" was done. Matthew W. Wallace, *Analyzing Fair Use Claims: A Quantitative And Paradigmatic Approach*, 9 U. Miami Ent. & Sports L. Rev. 121, 137 (1992).

[3] "Different functional purpose" is akin to "transformative use." *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578-79 (1984).

[4] "The E-meter is essentially a simple galvanometer using two tin cans as electrodes." *United States v. Article or Device "Hubbard Electrometer,"* 333 F. Supp 357, 359 (D.D.C. 1971).

By stark contrast, the purpose of Henson's post was to expose this allegedly illegal "medical" practice to the public.[5] Clearly, Henson's post served a "different functional purpose." As Henson himself explained his own purpose at trial:

> And in my estimation, NOTs 34, and my exposing of it, was the exposure of what I considered to be criminal activity going on inside of Scientology.[6]

Among the many "different functional purpose" cases reported by Nimmer, *Haberman v. Hustler Magazine, Inc.*, 626 F. Supp. 201 (D. Mass. 1986) found Hustler Magazine's reproduction of two photographs in their entirety to be fair. The magazine's purpose was to entertain its readers. There were no damages, no supplanting of the photographer's market. *Id.*

Even more on point is *Belmore v. City Pages, Inc.*, 880 F. Supp. 673 (D. Minn. 1995), in which a police officer (Belmore) wrote a short article that was published in a police union newspaper. City Pages republished Belmore's entire article, preceded and succeeded by critical commentary. City Pages' stated purpose was to criticize a "transparently racist" article by a police officer. *Id.* at 678 n.4.

As the City Pages editor put it, "[my] purpose in reprinting the entire article was . . . to ensure that my readers understood what I was criticizing . . . ." *Id.* at 679. The court agreed, finding the reprinting of the entire article to be "reasonable":

---

[5] Petitioner's contention that Scientology is engaged in the unauthorized practice of medicine is not a frivolous accusation. In a case not involving an E-meter, the State of Florida in November 1998 filed criminal charges against Scientology for the unauthorized practice of medicine, arising out of the 1995 death of Lisa McPherson. See Felony Information, *State of Florida v. Church of Scientology Flag Org., Inc.*, Cr. C-98-20377 (Fla. Cir. Ct.).

[6] [ER at 462]. RTC designated selective portions of the record in the appeal to the Ninth Circuit. As Henson was *pro se* at the time, he did not understand the importance of designating a record and so designated none. Later in this Reply, undesignated portions of the sworn trial and deposition testimony are cited to. If certiorari is granted, Henson will ask this Court to expand the formal record in the interests of justice.

> [A]lthough wholesale copying militates against a finding of fair use, this factor does not have significant weight when applied to the unique facts presented in this case.[7]

Both *Haberman* and *Belmore* demonstrate that a finding of fair use may be the only just result even when a work is copied in full. The facts in *Belmore* are remarkably similar to ours. City Pages was making a serious charge of racism against Belmore, just as Henson was making a serious charge of criminal activity against RTC. [App. R-4 at 292:19-293:2, 467:1-4, 507:18-22, 566:20-567:7, 569:2-13] City Pages determined that anything short of a full reproduction of Belmore's article would not "adequately communicate [the] repulsive message," *Belmore*, 880 F. Supp. at 679, just as Henson felt that NOTs 34 had to be quoted in its entirety so that readers could comprehend its somewhat obscure instructions. [App. R-4 at 547:18-25]

Rejecting judicial second-guessing as to how much copying is fair, the *Belmore* court declined to "involve itself in the myriad possible methods of excerpting" the original work. *Id.* at 679. Quoting only Step 4 (as RTC implies he should have) or omitting the text before Step One or after Step Eight would not have made Henson's use any more fair. On the contrary, it would have made Henson's charge that RTC was endangering public health much *less* understandable to the reader and, therefore, *un*fair.[8]

---

[7] *Id.* The third factor favored Belmore, but its weight was insignificant in the court's final analysis.

[8] "The Supreme Court has held that a 'productive use' of a copyrighted work, though not determinative, favors a finding of fair use." *Rubin v. Brooks/Cole Publishing Co.*, 836 F. Supp. 909, 916 (D. Mass. 1993) (citing to *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1984)). "A 'productive use' is one that 'result[s] in some added benefit to the public beyond that produced by the first author's work.'" *Rubin*, 836 F. Supp. at 916 (quoting *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 478 (1984) (Blackmun, J., dissenting)).

In this case Henson's post benefited the public by calling attention to RTC's allegedly criminal practice. Nor does there have to be proof that the post "'genuinely . . . benefitted the public,' but only that the use 'could have benefitted the public marginally.'" *Rubin*, 836 F. Supp. at 916; *see also Consumers Union of U.S., Inc. v. General Signal Corp.*,

II. INTEMPERATE SPEECH AND INTEMPERATE SPEAKERS ARE PROTECTED BY THE FIRST AMENDMENT

Scattering shots at Henson throughout its opposition, RTC apparently believes that Henson behaved irresponsibly ("solicited others to infringe"); immaturely (infringed "for fun and entertainment" and "to increase his status"); harassingly (to "drive up [RTC's] legal expenses"); vindictively (because of RTC's past conduct); and defiantly ("daring RTC"). Opp. at 1, 7, & 10.

Such labels are earmarks of persons with causes, who often use extreme speech and behave controversially, and whose speech and conduct are precisely what the First Amendment protects:

> Intemperate speech is a distinctive characteristic of man. Hot-heads blow off and release destructive energy in the process. They shout and rave, exaggerating weaknesses, magnifying error, viewing with alarm. So it has been from the beginning; and so it will be throughout time. The Framers of the Constitution knew human nature as well as we do. They too had lived in dangerous days; they too knew the suffocating influence of orthodoxy and standardized thought. They weighed the compulsions for retrained [sic] speech and thought against the abuses of liberty. They chose liberty.

Beauharnais v. Illinois, 343 U.S. 250, 286-87 (1952) (Douglas, J., dissenting).

Henson's behavior is not only understandable but praiseworthy when seen through a filter other than RTC's myopic one. Henson earnestly believed that RTC's "teachings" were criminal and endangered the public safety. [App. R-4 at 467:1-4, 507:18-22, 513:5-11, 566:20-567:7, 569:2-13; App. R-5 at 41:14-18; App. C at A27-29] Henson acted in what he perceived to be an overarching public interest. [App. R-4 at 509:8-511:18; App.

(continued from previous page)

724 F.2d 1044, 1050 (2d Cir. 1983) (scope of fair use "is undoubtedly wider when the information conveyed relates to matters of high public concern."), *cert. denied*, 469 U.S. 823 (1984).

R-5 at 38:25-39:5; App. C at A28] His right to speak intemperately (by some standards) is not only protected but cherished. *Baumgartner v. United States*, 322 U.S. 665, 673-74 (1944) ("One of the prerogatives of American citizenship is the right . . . to speak foolishly and without moderation.").[9]

Ironically, it is RTC's criticism of Henson that validates Henson's motives and lends dignity to Henson's otherwise "bad-boy" behavior. Henson's passion and intemperance only confirm his noncommercial, political purpose. They are not indicative of "bad faith" but establish precisely the opposite — that his was fair use.[10] In finding to the contrary, the courts below sanctioned the violation of Henson's First Amendment rights.

III. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH RELEVANT OPINIONS OF THIS COURT — OPINIONS WHOSE EFFECT IS TO PREVENT THE COPYRIGHT ACT FROM BEING USED TO SUPPRESS NONCOMMERCIAL POLITICAL SPEECH

This Court's decisions in *Harper & Row*, *Sony*, and *Campbell* establish that a lack of commercial motive and a lack of market harm compel a finding of fair use. This petition should be granted because the Ninth Circuit's decision conflicts with and misapprehends those decisions, particularly in the context of noncommercial, political speech.

---

[9] RTC's accusation that Henson solicited others to reproduce RTC's works is a distraction. Opp. at 1. A political speaker typically exhorts others to join him in his political activities. Henson believed that NOTs 34 was a "manual[] for criminal activities" and, as such, *needed* to be copied and exposed. App. C at A26. Henson sought only those materials "describ[ing] criminal activities." *Id.* Moreover, any solicitation by Henson is irrelevant as the judgment against Henson is based only on his posting of the single NOTs 34 document, not on any "solicitation."

[10] Bad faith is found in a "chiseler who infringes . . . for personal profits." 471 U.S. at 562; *see also Roy Export Co. v. Columbia Broadcasting Sys., Inc.*, 503 F. Supp. 1137, 1147 (S.D. N.Y. 1980) (bad faith is based on defendant's commercial motive and use), *aff'd* 672 F.2d 1095 (2d Cir.), *cert. denied*, 459 U.S. 826 (1982).

This case presents facts diametrically opposed to those in *Harper & Row*, in which the defendant had invoked the First Amendment to avoid a claim of copyright infringement for a clearly *commercial* use. 471 U.S. at 562. However, Henson had no commercial motive, *as Respondent concedes.*[11]

Sony, 464 U.S. at 451, sets forth the controlling law:

> A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work.

Here, the District Court found that there was no substantial likelihood of future market harm to RTC. App. B at A20. The Ninth Circuit did not disturb this finding. Accordingly, the Ninth Circuit erred in determining that Henson's posting of NOTs 34 was not a fair use. *See, e.g., National Rifle Ass'n of America v. Handgun Control Federation of Ohio*, 15 F.3d 559, 562 (6th Cir. 1994) (use "in exercising . . . First Amendment speech rights to comment on public issues" held fair); *Sundeman v. Seajay Society, Inc.*, 142 F.3d 194, 206 (4th Cir. 1998) (use that does not materially impair marketability generally deemed fair).

Instead, the Ninth Circuit misapprehended the meaning of actionable market harm by summarily noting that Henson had "conceded that such copying would lead to market harm." App. A at A-3. Henson, however, merely conceded that his criticism of Scientology may adversely affect the marketability of RTC's works "*not* because people will take the material from the

---

[11] Recognizing the lack of a commercial motive, RTC expends much of its Opposition trying to show that Henson's motive in the copying was to increase his status. Opp. at 1, 9, 22. Of course, RTC can point to no legal authority — and none exists — holding that pursuit of "fame" or "status" can serve as a substitute for commercial motive in the fair use analysis. As *Harper & Row* noted, "The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." 471 U.S. at 562. Henson did not attempt to profit from exploitation of NOTs 34; instead, he attempted to expose an alleged threat to public safety and protest an infringement of his First Amendment rights to discuss such threats.

internet and use it," but because it "will convince the public not to buy the product because it is rubbish." App. B at A19. This is precisely the type of market harm stemming from "biting criticism [that] suppresses demand" that this Court held is *not actionable* under copyright laws. *Campbell*, 510 U.S. at 592; *see also New Era Publications Int'l, ApS v. Carol Publishing Group*, 904 F.2d 152, 159 (2d Cir.) (market harm to L. Ron Hubbard biography caused by "devastating critique" of Hubbard was not within scope of copyright protection), *cert. denied*, 498 U.S. 921 (1990).

This Court noted in *Harper & Row* that the market effect of the use is "*undoubtedly the single most important element of fair use*." 471 U.S. at 566 (emphasis added). If the alleged infringer has no intent to exploit the copyrighted material for monetary gain, and no actionable market harm to the copyright holder exists, it plainly furthers both the First Amendment and the aims of the Copyright Act to allow the speech to take place.[12] "Copyright law is not designed to stifle critics." *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986).

The Ninth Circuit's decision also misapprehends *Harper & Row* in applying a presumption against fair use to "unpublished" works.[13] Where, as here, there is no effect on the market for an unpublished work, the courts have found fair use. *See, e.g., Wright*

---

[12]Here, Henson was engaged in pure *political speech*, which receives the highest level of First Amendment protection. *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 421-22 (1992) (Stevens, J., concurring).

[13] The implication of the *Harper & Row* decision as to the fair use of unpublished works is in need of clarification by this Court. Unfortunately, some courts have seized on the statement in *Harper & Row* that "the scope of fair use is narrower with respect to unpublished works" in applying a virtual presumption against a finding of fair use with respect to unpublished works. 471 U.S. at 564; *see, e.g., Salinger v. Random House, Inc.*, 811 F.2d 90, 97 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987); *New Era Publications Int'l, ApS v. Henry Holt & Co.*, 873 F.2d 576, 582 (2d Cir. 1989); *Sinkler v. Goldsmith*, 623 F. Supp. 727, 732 (D. Ariz. 1985). Although Congress amended Section 107 of the Copyright Act in 1992, the presumption continues. *See, e.g., CSM Investors, Inc. v. Everest Dev., Ltd.*, 840 F. Supp. 1304, 1313 (D. Minn. 1994). Here RTC incorrectly claims that the Ninth Circuit and District Court "properly found" the "unpublished" nature of the work "decisive." Opp. at 22.

v. Warner Books, Inc., 953 F.2d 731 (2d Cir. 1991) (use of unpublished letters); *Norse v. Henry Holt & Co.*, 847 F. Supp. 142, 147 (N.D. Cal. 1994) (same); *Sundeman*, 142 F.3d at 208 (quotation from unpublished manuscript).

IV. HENSON RAISED THE FIRST AMENDMENT AND FAIR USE ISSUES BELOW BUT RTC *OPPOSED* HENSON'S MOTION TO HAVE PRO BONO COUNSEL FULLY BRIEF THOSE ISSUES

RTC argues that this Court should not grant certiorari because "Henson did not raise any of the grounds presented in his Petition in his briefs to the court of appeals." Opp. at 12.

This assertion is untrue. Henson repeatedly raised the First Amendment and fair use issues in his *pro se* briefs on these appeals.[14] [*See* App. R-2, App. R-3.]

RTC also neglects to mention that it *opposed* Henson's motion to file a formal brief more fully addressing the issues below after he found *pro bono* counsel in November 1998 — an event that took place after he had already filed his *pro se* briefs.[15] Because RTC refused to stipulate to allow Henson to file counsel-prepared briefs, Henson, in December 1998, filed a motion requesting leave to file a new brief addressing "the application of the fair use defense, and specifically the first amendment, to

---

[14] Henson's four-page *pro se* brief appealing the District Court's grant of summary judgment on the copyright infringement claim (No. 97-16160), clearly raises these issues as grounds for appeal. *See* App. R-2 at 3 ("[W]hile the Constitution gave Congress the power to grant copyrights for the general welfare, such laws could not be extended to override the First Amendment and protect criminal activity from disclosure."). Similarly, the *pro se* brief appealing the judgment (No. 98-16146) also raises these issues. *See, e.g.*, App R-3 at 7 ("Defendant believed that the Court's temporary restraining order if applied to him was a violation of his First Amendment rights to discuss the criminal activities of the cult of Scientology with examples. This was his intent in posting NOTs 34 on March 30, 1996. . . . "). Henson's original posting also raises these issues. [App. R-1, filed under seal].

[15] RTC's claim that Henson refused four offers of *pro bono* assistance is false. Henson spoke to various lawyers about the possibility of representing him on a *pro bono* basis in this action, but *none agreed to do so* until November 1998. 4/2/96 Hearing Tr., at 2:2-3:20, App. R-6.

copyright infringement" with citation to legal authority. Motion for Leave To File A Formal Brief, at 2.

RTC aggressively opposed this motion, arguing in its 20-page opposition that: (1) granting the motion would prejudice RTC and (2) "*there is no reason to believe that any further 'formal' briefing by new counsel on these issues would 'aid' the Court in any way.*" Opp. to Motion to File Additional Brief, at 6-19 (emphasis added). In February 1999, the Ninth Circuit denied Henson's motion. Having actively opposed Henson's attempt to brief the issues fully, RTC cannot now hide behind Henson's inability to state his legal arguments more artfully.

In addition, at the March 2, 1999 oral argument on the appeals, Henson's *pro bono* counsel fully argued the fair use issues to the Ninth Circuit, including those raised in this Petition.

Finally, the Ninth Circuit itself addressed the First Amendment and fair use issues, noting that Henson had raised them. [App. A at A2-A4.][16]

Respectfully submitted,

CHARLES B. ROSENBERG
ANN I. PARK
ROBERT J. STOCK
HELLER EHRMAN WHITE & MCAULIFFE

Attorneys for Petitioner

---

[16] Even if the issues had not been raised in the Ninth Circuit, this Court could still address them. *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980) ("Though we do not normally decide issues not presented below, we are not precluded from doing so.").

APPENDIX R-1

FILED SEPARATELY UNDER SEAL

APPENDIX R-2

PETITIONER'S PRO SE BRIEF
IN SUPPORT OF APPEAL NO 97-16160
(Reproduced In Full, Emphasis Added)

CASE NO. 97-16160

2. What are the facts of your case?

Defendant wrote a letter to the District Court asking if the Court was aware of the contents of one of the of the [sic] documents it had enjoined from being disclosed in that case. When the Court did not respond, defendant posted the letter (which included about two pages of a document called NOTs 34 -- THE SEQUENCE FOR HANDLING A PHYSICAL CONDITION) to the Internet. **Defendant's purpose (as stated in the letter) was to find out if the District Court knew that it, and the trade secret/copyright laws, were being used to suppress the free discussion of matters of public concern, and to warn the public of the sometimes lethal dangers of Scientology.** RTC, the purported copyright enforcer, (though not holder) sued the defendant for trade secret and copyright violation. RTC later dropped the trade secret claims with prejudice.

Defendant tried to get the District Court to rule on the contents of NOTs 34 being essentially an instruction manual for criminal activity (practice of medicine without a license) or a violation of an earlier order by Judge Gesell which forbade Scientology to make the type of emeter related healing claims made in NOTs 34. However, the District Court refused to rule

that the contents (if carried out) were or were not criminal in nature or if they violated the terms of Gesell's order.

Defendant also argued that the copyright laws were being misused, and that the [sic] while the Constitution gave Congress the power to grant copyrights for the general welfare, such laws could not be extended to override the First Amendment and protect criminal activity from disclosure. These arguments were rejected and the defendant was further enjoined from supplying a copy of NOTs 34 i.e., evidence of criminal activity and violation of a previous court order, to the FDA.

The District Court then ruled in summary judgment that the defendant had violated the copyright of RTC.

Defendant appealed.

3. What did you ask the district court to do (for example, award damages) give injunctive relief, order your release from prison, etc.)?

See above.

4. State the claim or claims you raised at the district court.

NOTs 34 is a criminal instruction manual for the illegal practice of medicine with an FDA regulated device known as an emeter. On that basis the plaintiff can make no copyright claims because Congress has no authority under the Constitution to extend copyright protection to instructions for organized criminal activity.

(If the Appeals Court has any doubt about the dangers and sometimes lethal effects of Scientology's quack "medical" procedures, it may consult the November 1, 1997 front page story in the New York Times, or Newsweek July 21,1997, page 77 "A Death in Clearwater." The latter was made part of the record.)

5. What issues are you raising on appeal?

Same as 4.

(Appendix R-2)

6. Did you present all these issues to the district court?

Yes

7. What law supports these issues on appeal? (You may, but need not, refer to cases and statutes.)

I believe this to be a case of first impression.

To my knowledge not even the tobacco industry was so brazen as to use copyrights or trade secrets to suppress their leaked internal documents. (Though they certainly could have, and before this trial Court might have prevailed.)

My question to the Courts is the same as the date I wrote the open letter to Judge Whyte. Is it proper to use copyright and trade secret laws to prevent public disclosure of criminal activity?

So far, the answer has been yes.

8. Do you have any other cases pending in this court? If so, give the name and docket number of each case.

None

9. Have you filed any previous cases which have been decided by this court? If so, give the name and docket number of each case. RTC vs Henson, No. 97-15109

APPENDIX R-3

EXCERPTS FROM
PETITIONER'S PRO SE BRIEF
IN SUPPORT OF APPEAL NO 98-16146
(Emphasis Added)

---

2. What are the facts of your Case?

[Based on a denied motion for new trial filed June 5, 1998 by defendant's counsel at trial Graham E. Berry.]

Facts prior to trial are summarized in Appeal No. 97-16160. That appeal has been noticed for possible oral argument, but a date has not been set. If the Appeals Court so desires, these appeals may be consolidated.

On May 11, 1998, the jury in this case rendered a verdict that, in effect, found that copyrights could be used to conceal criminal conduct and that people could be punished for exposing such activities if they quote too much copyrighted material for context. Such a finding was clearly contrary to public policy and the purpose of the copyright legislation -- so much so that the jury's finding has generated significant internet debate and national media interest such as the lead editorial on July 21, 1998 in the Wall Street Journal. Plaintiff also applied for fees and costs in the amount of nearly $1,000,000, and were awarded costs of about $20,000 and attorney fees of $75,000. Defendant, a person of limited means was forced to filed [sic] for protection under Chapter 13 bankruptcy.

(Appendix R-3)

I. THE CASE THROUGH TRIAL

Defendant H. Keith Henson is a consulting engineer in the computer hardware and software business. (Tr. Vol. 4, 436:13-20). Defendant has long had an interest in areas of free speech, particularly in recent years in connection with the establishment, development, and expansion on the internet. (Tr. Vol. 4, 442:5-9). Defendant became aware that one of Plaintiff's attorneys had attempted to "cut off the free speech rights of anybody who wanted to discuss" the topic of Scientology on the news group alt.religion Scientology--ARS (Tr. Vol. 4, 442:17-444:18).

Defendant then proceeded to take an interest in ARS and read tens of thousands of postings to that news group. (Tr. Vol. 4, 444:19-23). Between January 11, 1995 and March 30, 1996, Defendant would spend up to 45 minutes a day, sometimes twice a day, reviewing the posts to ARS, and making about 1200 postings (500 to 1000 pages of text) in an ongoing and wide ranging debate. (Tr. Vol. 4, 448:7-12). Defendant became aware that the trial Court enjoined Grady Ward from posting certain documents including NOTS 34. (Tr. Vol. 2, 204:11-25). The trial Court had enjoined Mr. Ward from posting or publishing a number of documents including one called NOTS 34. (Tr. Vol. 4, 471:11-472:19). Defendant was aware that NOTS 34 was part of Scientology's upper levels OT-1 through OT-8. (Tr. Vol. 4, 462:3-14). Between January 11, 1995 and March 30, 1996, Defendant had seen NOTS 34 on the internet on perhaps 20 different occasions. He was not aware of anyone's having been sued for posting it. (Tr. Vol. 4, 478:6-20). In fact, defendant had at one time obtained a copy of NOTs 34 from a scientology associated web site (theta.com).

After the Grady Ward temporary restraining order had issued, Defendant went looking (on the news spool of Netcom) for the various items that were on the list of documents enjoined.

(Appendix R-3)

NOTS 34 was the first document that turned up in that search. (Tr. Vol. 4, 479:10-18). Defendant then wrote a letter (Defendant's Exhibit "A") to the trial Court seeking clarification as to whether he was bound by the Ward temporary restraining order, and commenting on the material and the effects such injunctions would have on public debate. (Tr. Vol. 4, 474:7-475:8) He was not aware that a judge could not respond to correspondence such as his letter. (Tr. Vol. 4, 475:7-8). On March 29, 1996, Defendant spoke to the trial Court's Clerk and was told that he was not a party to the Ward case. He concluded that he could safely post his open letter to the trial court on the internet under his own name, commenting on both the contents of it and the social policy of using trade secret and copyright law to discourage public knowledge of its content. By word count the comment and the original document are about the same length, the comment is longer if you discount common elements to the NOTs series such as address blocks. (Tr. Vol. 4, 475:22-478:4).

Defendant believed that the Court's temporary restraining order if applied to him was a violation of his First Amendment rights to discuss the criminal activities of the cult of Scientology with examples. This was his intent in posting NOTS 34 on March 30, 1996. (Tr. Vol. 4, 481:8-16). By March 13, 1996, Defendant had begun to understand what NOTS 34 was all about. (Tr. Vol. 4, 481:17-19). At the damages hearing, he explained his understanding. (Tr. Vol. 4, 481:20-504:24). As part of that understanding he believed that NOTS 34 involved the use of an E-meter. (Tr. Vol. 4, 496:7-499:16). He saw no reference in the NOTS 34 document recommending a Scientologist seek medical attention along with or in place of auditing with an E-meter. (Tr. Vol. 4, 499:21-500:2).

He had also acquired information that had led him to believe that Scientology E-meter processing could lead to dangerous physical conditions, even death. (Tr. Vol. 4,

500:4-501:1). Defendant was also aware and stated so in the letter that the Church of Scientology was under a court order stemming from the FDA's actions in the early 1970s against making medical claims involving the use of the E-meter. (Tr. Vol. 4,:13-506:13). Defendant concluded that NOTS 34 was a direct violation of Judge Gessel's injunction and further constituted an example of criminal activity on the part of Scientology. (Tr. Vol. 4, 506-508:17). After Defendant posted NOTS 34 (and his comment in the context of the letter to the trial court) to the internet on March 13, 1994, he received an e-mail from Scientology attorney, Ms. Kobrin. That e-mail contained a copyright claim. (Tr. Vol. 4, 508:3-8). **However, Defendant did not believe that it was at all proper to claim copyright protection for criminal instruction manuals.** (Tr. Vol. 4, 517:4-6. See generally, Tr. Vol. 4, 508:9-517:6).

Religious Technology Center, one of the corporations and Churches of Scientology then sued Defendant alleging trade secret and copyright violations. Subsequently, RTC dismissed its trade secret claim and proceeded with the copyright claim alleging one violation. Plaintiff's motion for summary judgment was granted and is the subject of Appeal No. 97-16160. That appeal has been noticed for possible oral argument, but a time has not been set.

Defendant's defense of fair use was rejected principally because the document (about two pages) was copied and posted in its entirety, though is it but a small fraction of the registered unit of some 60 NOTs issues. The matter would have been gone to a bench trial except for a recent Supreme Court decision that even statutory damages required a jury trial. The matter then proceeded to a hearing before a jury upon the issue of statutory damages. Until approximately one week before trial, Defendant had been pro per. He then borrowed against a credit card to retain counsel to represent him at the evidentiary hearing which commenced on May 4, 1998. At trial, the central issue was

whether Mr. Henson's posting of NOTS 34 on March 30, 1996 was willful and what damages should be awarded to RTC for that infringement.

* * * *

On May 12, 1996, the jury returned a verdict finding that Defendant's infringement of the copyright in Plaintiff Religious Technology Center's work was willful and awarded damages to Plaintiff in the amount of $75,000. (Tr. Vol. 5, 725:16-23). Defendant now appeals on the grounds that the verdict was against the weight of evidence, the damages were excessive, there are errors in excluding evidence and the conduct of Plaintiff's counsel improperly influenced the deliberative process.

II. THE VERDICT WAS AGAINST THE WEIGHT OF EVIDENCE

* * * *

As noted above, Defendant testified at length as to his good faith and reasonable belief that NOTS 34 constituted the unlawful practice of medicine in violation of a district court injunction issued at the request of the Food and Drug Administration. Thus, he had a reasonable belief that his infringement disclosed illegal activity and he further testified at length that he believed he was legally justified by some paramount public interest superseding copyright law. No evidence was offered by the Plaintiff to rebut Defendant's evidence in this regard. Plaintiff did not call one single witness to contradict Defendant's testimony that NOTS 34 involved the unlawful use of an E-meter to "cure" a physical condition. Plaintiff offered no evidence to rebut Defendant's testimony that the use of the E-meter constituted criminal activity by the Church of Scientology in violation of a federal court injunction. Plaintiff offered no evidence, expert or otherwise, on the issue of whether copyrights could be used to conceal illegal activity. On the other

hand, **Defendant testified that he believed that copyrights could not be used to conceal criminal activity.** Consequently, the jury's verdict is against the weight of evidence and should be overturned.

III. THE JURY'S VERDICT WAS EXCESSIVE

* * * *

Defendant consistently testified that he believed that copyright laws could not be used to conceal criminal conduct and that, therefore, no infringement of copyright had taken place, and that NOTS 34 constituted the unlawful practice of medicine, and he reasonably believed that he would not be violating copyright law by posting NOTS 34. Plaintiff sought an award of maximum statutory damages in order to deter Defendant and others from further violations of its NOTS 34 copyright.

* * * *

IV. THERE WERE ERRORS IN EXCLUDING EVIDENCE

* * * *

Defendant's belief in the criminality of NOTS 34 was not reached in a vacuum. He had read materials regarding Plaintiff's criminal activities in general including a May 6, 1991 Time magazine cover story entitled "Scientology, Thriving Cult of Greed and Power". Defendant submitted both an offer of proof re evidence of Scientology beliefs and practices (filed May 5, 1998) and a trial brief on issues regarding the admissibility of evidence and related matters on May 11, 1998. For the purposes of this appeal, the contents of both documents are incorporated herein in their entirety. The court rejected Defendant's offer of proof. It furthermore rejected most of the evidence Defendant

wished to introduce as to his relevant state of mind at the time of the alleged infringing publication. (Tr. Vol. 5, 7:21-6).

Generally, the court rejected all evidence as to defendant's *information or* belief that the Church of Scientology was a criminal cult guilty of other crimes as being irrelevant and highly prejudicial. In his order granting attorney's fees for plaintiff Judge Whyte wrote:

"Much of what Henson tried to do throughout the case was to turn the lawsuit into a trial of Scientology. Therefore, many of the positions he took before trial and much of what he and his counsel wanted to do, and to some extent did do, during trial had no relevance to the pertinent issues."

In limiting the defense to "the pertinent issues," the trial court denied presentation of defendant's knowledge of the Church of Scientology's involvement in widespread criminal and fraudulent activity that, in large part, led him also to conclude that his posting of NOTS 34 did not infringe Plaintiff's copyrights and that Plaintiff's copyright claims were either invalid and/or constituted misuse of copyright.

The court rejected Trial Brief Section III, section A through 11, limited section L, rejected section M through V and severely limited section W through Y. **In doing so, it prevented Defendant from showing that Plaintiff's selective enforcement of its claimed copyrights were really an application of Scientology's "fair game" doctrine against Defendant.** Moreover, it declined to allow Defendant's counsel to show that Plaintiff's representations regarding fair game were false as shown by the authorities cited by Defendant. As the Trial Brief indicated, all of the evidence Defendant wished to introduce as to his state of mind at the time he posted NOTS 34 was known to him at or prior to that time. **It was that evidence that, in large part, led him to conclude that the Plaintiff's use of NOTS 34 had caused death and serious illness and injury and that**

(Appendix R-3)

Plaintiff's criminal and fraudulent activities generally, and specifically in relation to NOTS 34 and other of the upper level materials, constituted misuse of copyright and the use of copyright to conceal and mask criminal conduct. Thus, the

In addition, it was an error to refuse Defendant to introduce any exhibits other than Exhibit "A" and to call any witnesses notwithstanding he had failed to list any exhibits or witnesses prior to his retention of counsel upon the eve of trial. Particularly, since he had been in pro per throughout almost the entirety of the case and facing up to ten lawyers from five different law firms at any one point in time, and had been massively distracted during the months before trial by trumped up civil criminal charges by Scientology operatives in Los Angeles, Riverside (CA), and Clearwater (FL). Such massive overlitigation, and the abuse of the litigation process, by Plaintiff should have led the Court to exercise its discretion in permitting Defendant to avoid the undeniable impression the jury received that, since he had no additional witnesses or exhibits, he had no case to present in his defense. (Tr. Vol. 4, 415:15-19).

Furthermore, the court refused to permit defendant to testify as to the basis of his belief that "someone had been injured by the use of the procedure outlined in NOTS 34." (Tr. Vol. 4, 501:24-502:10). At side bar, Plaintiff argued, and the court agreed, that defendant could not come to a reasonable belief about a subject merely from watching an interview of a former (and now dead) member of scientology he [sic] seen on the television from something like the "Sally Jesse Raphael Show". [A tape defendant had in court and would have played if permitted.] In essence, the court held that defendant's state of mind, and reasonable belief, could not be based upon what he had read or seen in the media. (Tr. Vol. 4, 517:21-518:22). It is respectfully submitted that this is a misstatement and error as to any objective reasonable belief and it is certainly error as to the reasonableness of Defendant's subject of belief. Accordingly,

damages should be reduced, by way of remittitur, and/or a new trial ordered.

* * * *

3. What did you ask the district court to do?

Originally to rule in my favor and against RTC on copyright violation claims on the basis of improper use of copyright.

4. State the claim or claims you raised at the district court.

That copyrights should not be used as a weapon against those who would expose criminal activity.

5. What issues are you raising on appeal.

1. That the verdict is against the weight of the evidence;
2. That the verdict is excessive;
3. There were errors in excluding evidence;
4. Conduct by Plaintiff's counsel improperly influenced the deliberative process.

I am asking the Appeals Court to exercise principals of equity, justice and fair play and to reverse the district court or order a new trial. **The jury was kept from important information and as a result its finding is contrary to each of those things and certainly contrary to what the framers of the Constitution must have had in mind when they provided for the protection of copyrights.** On public policy grounds alone, this appeal should be granted. The Courts should not just leave it to Congress to take the appropriate remedial action for such abuse.

(Appendix R-3)

6. Did you present all these issues to the district court?

To the extent the issues in question were valid at that time and the court permitted them to be raised, I believe so.

7. What law supports these issues on appeal? (You may but need not, refer to cases and statues.)

I believe the underlying issue of using copyright law to conceal criminal conduct is a case of first impression. I am essentially sure that Congress did not have this use in mind when they wrote and passed the copyright laws.

There is case law which support a fair use finding for using as much copyrighted material as is required to accomplish the task at hand, even an entire work. These were cited in the last hearing before Judge Whyte in the related Erlich case, but I failed to hear them clearly enough to obtain the cites.

* * * *

10/13/98

H. Keith Henson
Box 60012
Palo Alto, CA 94306

APPENDIX R-4

EXCERPTS OF PETITIONER'S TESTIMONY AT TRIAL IN UNITED STATES DISTRICT COURT CASE NOS. C-96-20271 AND C-96-20207 (Emphasis Added)

May 6, 1998 at 292:19-293:2

[BY MR. BERRY:] He then asked you as to whether NOTs 34 was a religious work, and you said it was a matter of opinion; correct?

A That's true.

Q And what is your opinion as to whether or not it's a religious work?

A **I believe it is a religious work and a criminal instruction manual for the practice of medicine without a license.**

May 11, 1998 at 467:1-4

[BY MR. BERRY:] **Prior to March 30, 1996, did you believe that the use of the E-meter in connection with NOTs 34 could be dangerous?**

A Yes.

(Appendix R-4)

May 11, 1998 at 507:18-22

[BY MR. BERRY:] Mr. Henson, what was your belief at the time you posted NOTs 34 concerning medical practice, the E-meter and what that constituted?

A Well, I believed it was one -- I believed it was an example of criminal activity on the part of Scientology.

May 11, 1998 at 509:8-511:18

[MR. HENSON]: My -- my understanding of copyright law is heavily predicated on my, on my experiences with the Internet.

And the Internet itself takes copyright very seriously. Indeed, people, customers on the Internet take copyright very seriously.

But it's primarily taken very seriously in terms of crediting where credit is due, rather than -- the Internet provides a forum in which it is assumed that material which has been posted on the Internet will be commented upon and large pieces of it brought into your own posting and then additional material added to that.

With the particular example here, I believed that there was an overriding interest in exposing not merely the document itself, because it was widely available on the Internet, but exposing my understanding of the document as to what it meant and what the consequences of it were, both with respect to it being a dangerous piece of material if carried out, perhaps even lethal, and it being a very bad precedent to use copyright law to suppress the public discussion of what I view, to this day, as criminal activity.

(Appendix R-4)

THE COURT: The question, though, Mr. Henson was did you believe that there was something about copyright law that trumped or preempted, or that was trumped or preempted if the person who posted thought that the document reflected the illegal practice of medicine?

THE WITNESS: Yes, I did.

THE COURT: And where -- go ahead.

BY MR. BERRY:

Q What was that belief?

A My belief in this was based, at least to some extent, on the actions which were going on at the same time with respect to the vast amounts of documents that had been exposed in the tobacco litigation.

Q And how did that impact upon your belief in connection with NOTs 34?

A The tobacco litigation was the exposure of trade secret, and if not criminal, very close to it, activities going on inside the tobacco companies and in my estimation, NOTs 34, and my exposing of it, was the exposure of what I considered to be criminal activity going on inside of Scientology.

MR. ROSEN: Your honor --

THE COURT:That doesn't really answer the question. What did that have to do with copyright law?

THE WITNESS: **I believed, your honor, that copyright law had to fall in the face of more important things like public safety.**

THE COURT:The tobacco litigation did not involve copyright law to your understanding, did it? I just want to understand what you're saying.

THE WITNESS: Of course it did, your honor.

MR. ROSEN: I didn't hear that.

THE COURT: Did it --

THE WITNESS: Everything is copyrighted the minute it is created. That's the way -- that's the nature of the 19 -- of the law that went into effect in 1978.

So the tobacco -- all these internal papers on the tobacco litigation were copyrighted. They just never had the chutzpah, or however it's pronounced, to claim copyright and to try to suppress the documents on the basis of copyright.

May 11, 1998 at 513:5-11

[MR. HENSON]: **In this particular case, I figured that there was a very fair probability that I was breaking a copyright law on it, but in my particular feeling at the time, and for that matter, to this day, I feel that the exposure of much more serious, potentially lethal, public safety problems is more important than the copyright laws.**

And if that is not the case, I suffer for it.

May 12, 1998 at 547:18-25

[BY MR. BERRY:] Now, you posted the entirety of NOTs 34, didn't you?

A That's true.

Q And why did you do that?

A **I didn't believe that any less would suffice to demonstrate the point that I was attempting to make, and I didn't want anybody to be able to say, "well, you're quoting this out of context."**

(Appendix R-4)

May 12, 1998 at 566:20-567:7

[BY MR. ROSEN:] **Mr. Henson, I believe you said yesterday that you honestly thought that NOTs 34 was the illegal practice of medicine when you posted it; is that right?**

A That's correct.

Q And you sincerely believed that and deeply believed that?

A More correctly it is not the practice of medicine, the instructions for the practice of medicine without license.

Q And you sincerely and deeply believe that; right?

A With -- I believe complete justification, yes.

May 12, 1998 at 569:2-13

[BY MR. ROSEN:] Well, let me understand something now, Mr. Henson. The purpose then of your posting NOTs 34 to the Internet was to save people from being exposed to this?

A No.

Q Tell me what your purpose was.

A My purpose was to expose the material.

Q And you thought that this --

A And comment on it.

Q And you thought this material was a crime?

A No.

Q Or an instruction as to how to commit a crime?

A Yes.

APPENDIX R-5

EXCERPTS OF TRANSCRIPT OF PETITIONER'S MAY 8, 1996 DEPOSITION

(Emphasis Added)

38:25-39:5

[BY MR. LIEBERMAN:] And is the same thing true with misappropriating their trade secrets? If you have a sufficient motivation, then it's okay to do that?

A Not motivation. **If there is a sufficient -- like public interest and so forth.**

Q And who determines this?

A You take the risk yourself.

41:14-18

[BY MR. LIEBERMAN:] Uh-huh. Basically you came to your own determination that this was a permissible --permissible use of the NOTs materials; is that right?

A NOTs 34 is criminal on the face of it. Not only that, it's a violation of Judge Gesell's order.

APPENDIX R-6

EXCERPTS FROM OFFICIAL TRANSCRIPT OF APRIL 12, 1996 DISTRICT COURT HEARING RE MOTION FOR ORDER FOR LEAVE TO SHOW CAUSE RE PRELIMINARY INJUNCTION

(Emphasis Added)

Pages 2:2-3:20

THE CLERK: Calling case C-96-20261, Religious Technology Center versus Keith Henson, on for order to show cause re preliminary injunction.

MR. HOGAN: Good morning, Your Honor. Thomas R. Hogan for the plaintiffs, Religious Technology Center. And with me, Your Honor, this morning, if I may, are three lawyers that I would like to move for their admission pro hoc vice. Mr. Roger Milgrim and Mr. Bill Hart are both partners in the Paul, Hastings firm in New York. Mr. Eric Lieberman is a partner in the Rabinowitz law firm in New York.

THE COURT: Have you filed applications?

MR. HOGAN: I have, Your Honor, with respect to all three of those individuals.

THE COURT: All right.

MR. HENSON: Keith Henson, pro per.

THE COURT: Okay. Mr. Henson.

MR. HOGAN: The only other thing I would like to address to the Court very briefly, Your Honor, before we start, is that Mr.

(Appendix R-6)

Henson came to my office on Wednesday of this past week and delivered his motion. I asked him who would be representing him this morning and he advised me that four separate lawyers had offered their services pro bono. He believed, however, he was going to represent himself. I asked him to let me know if any of those lawyers where chosen by him to represent him in this matter, and I have not heard.

THE COURT: . . . With respect to your appearance in this matter, is it your intent to have counsel, or what is the story on that?

MR. HENSON: Not at this time.

THE COURT: Okay.

MR. HENSON: By the way, I would mention that there were four law firms who might be interested, and it's not that any of them have agreed to do it.

THE COURT: I understand. What I wanted to just find out is whether you want to be represented, because that is important to me for me to know for a variety of reasons, including scheduling.

MR. HENSON: **At this point, I simply don't know.**